United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-2447

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CATHERINE BRIGHT,

Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of New York

BRIEF AND APPENDIX FOR APPELLANT CATHERINE BRIGHT

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	
-v-	:	Docket No. 74-2447
CATHERINE BRIGHT,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT CATHERINE BRIGHT

I. THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed reversible error by excluding psychiatric testimony on the question of appellant's state of mind at the time of the alleged crime.

2. Whether the district court's instructions to the jury with respect to the element of knowledge under 18 U.S.C. § 1708 constituted reversible error.

II. STATEMENT OF THE CASE

Catherine Bright appeals from a judgment of conviction entered on November 6, 1974 in the United States

District Court for the Southern District of New York, after a three day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury (74 Cr. 247).

An indictment, filed March 14, 1974, charged in each of twelve separate counts that appellant "did unlawfully, wilfully and knowingly have in her possession" a New York City welfare check "which had been stolen, taken, embezzled and abstracted from and out of authorized depositories for the United States mails knowing the same to have been stolen, taken, embezzled and abstracted" in violation of 18 U.S.C. §§ 1702 and 1708.

Trial began on October 2, 1974. Thereafter, upon motions by the government, the district court dismissed the charges relating to five of the checks (counts one, four, five, eight and nine of the original indictment).* On October 4, 1974, the jury returned a verdict of not guilty with respect to four checks (counts one, two, seven, and eight of the redacted indictment), but found the appellant guilty as charged with respect to the remaining three (counts five, six and nine of the redacted indictment). On November 6, 1974, Judge Motley sentenced appellant to six months imprisonment. Execution of the sentence was suspended and appellant placed on six months probation.

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* Counts one, eight and nine were dismissed prior to the introduction of evidence. Thereafter, the government continued the prosecution of appellant under a redacted indictment. Counts four and five of the original indictment (three and four of the redacted indictment) were dismissed after the jury began its deliberations.

At sentencing, appellant was granted leave to appeal in forma pauperis and notice of appeal was duly filed. Appellate counsel was appointed by order of this court dated November 15, 1974.

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. The Crime Charged

Appellant was tried for the alleged commission of nine separate offenses under 18 U.S.C. § 1708. This statute provides, in pertinent part:

> Whoever . . . unlawfully has in his possession . . . any . . . mail . . . which has been . . . stolen, . . . knowing the same to have been stolen . . . [s]hall be fined not more than $2,000 or imprisoned not more than five years, or both.

To secure conviction, the government was required to prove beyond a reasonable doubt with respect to the crime alleged that:

1. a city of New York welfare check was deposited in the mail;

2. such check was stolen from the United States mails;

3. subsequent to its theft, appellant had such check in her possession;

4. appellant's possession of such check was wilful; and

5. at the time such check was in her possession, appellant knew it had been stolen. (Ex. F, 15-19).*

B. The Relevant Facts

The facts relevant to this appeal are simple, and with one singular exception, uncontroverted.

At the time of trial Catherine Bright was twenty-six years old. (Tr. 101).** She was a student in her sophomore year at LaGuardia College (Tr. 102), and worked for the Board of Education at an early childhood center. (Tr. 140).

Appellant's marriage was unsuccessful (Tr. 103); she was separated from her husband and had custody of her nine year old son. (Tr. 102). Some time after her separation, she began living with her boyfriend and childhood companion Leslie Chenoweth. (Tr. 102-03). Mr. Chenoweth introduced appellant to Fred Scott and the three of them became close friends. (Tr. 103-04).

During the period from May through August, 1972, nine welfare checks were issued and mailed to various New York City welfare recipients; these checks were never received by the intended recipients and were apparently stolen from the mails (Tr. 36-57). Fred Scott gave these welfare checks (and others) to appellant and asked her to cash them

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* The reference "Ex." is to the respective exhibits of appellant's brief which are annexed hereto. The numbers following such reference refer to particular pages of such exhibit.

** The reference "Tr." is to the transcript of the trial in the district court.

for him. Scott explained that he could not cash the checks because he had no bank account. (Tr. 139). Appellant testified Scott told her that some of the checks were from tenants in an apartment he had sublet and others were from persons who owed him money. (Tr. 123, 128). In every instance except one, the checks had been endorsed prior to the time they were shown to the appellant. (Tr. 137, 148, 151, 155). In that single instance Scott endorsed the check, explaining to appellant that the payee had been in an accident and had not been able to sign it. (Tr. 137).

Appellant cashed or deposited each of the checks for Scott at branches of the United Mutual Savings Bank, where she maintained two savings accounts, one in her married name, Catherine Bright, and the other in her maiden name, Catherine Haynes. (Tr. 57-62, 137). In each instance she gave the proceeds from these checks to Scott. On some occasions, however, Scott asked appellant to hold the money for him. (Tr. 135).

One of the checks which Scott gave appellant, and which she cashed for him by depositing it in her bank, was returned unpaid and her account was accordingly debited. (Tr. 132). When she found out that the money had been taken from her account, she confronted Scott. He told her that he would have to speak to the person who gave him the check

and that he would reimburse her. (Tr. 132). Scott did in fact reimburse appellant. (Tr. 133).

Although appellant knew that one check had "bounced" she nevertheless, at Scott's urging, cashed three more checks for him because she believed them to be rent checks and, thus, "there was nothing wrong with them." (Tr. 133-134). At all times appellant acted in an overt and conspicuous manner which would hardly bespeak criminal intent on her part. Nonetheless, it was for possession of each of these three checks that appellant was convicted, even though she testified that she did not know that any of the checks had been stolen. (Tr. 127).

C. THE OFFER OF PROOF; THE DISTRICT COURT'S ERRONEOUS EXCLUSION OF RELEVANT EVIDENCE

Prior to the introduction of any evidence at trial, defense counsel made an offer of proof with respect to the anticipated testimony of Dr. Norman Weiss, a psychiatrist who had examined appellant. See, Ex. E. Dr. Weiss was prepared to testify that appellant had a documented history of psychiatric treatment and suffered from a recognized mental disorder which resulted in her being, under the factual circumstances in evidence, "incapable of knowing that the checks in question were stolen". (Ex. D, 3). As stated in Dr. Weiss' letter, dated September 28, 1974, to Joseph Zedrosser, Esq., appellant's

counsel in the district court:

> I do not believe that she knew that the checks that she allegedly possessed were stolen as a result of her need to deny the possibility that the men involved would in any way take advantage of her. This passive-dependent personality disorder rendered her incapable of understanding this.
>
> (Ex. E, 3).

Trial counsel stated that appellant did not intend to assert this evidence in support of a defense of insanity. (Ex. D, 3). Rather, the purpose of Dr. Weiss' proffered testimony would be to adduce evidence "to oppose one of the elements of the crime which the Government has the burden of proving, to wit, that the defendant knew the checks were stolen". (Ex. D, 3).

On the day before appellant's trial began, appellant was examined by a psychiatrist retained by the government. That psychiatrist, Dr. Portnow, had apparently reached conclusions with regard to appellant's mental state at the time of the alleged crime which differed from those of Dr. Weiss. The government conceded that "in the normal case [this divergence of views] might perhaps create an issue of fact for the jury". (Ex. D, 2). However, the government's position was that a psychiatrist's testimony, "with respect to knowledge only, and not asserting the Freeman insanity defense, is totally inadmissible and irrelevant in this Circuit". (Ex. D, 2).

The district court agreed with the government and excluded the psychiatric testimony proffered by appellant. (Ex. D, 9).

D. THE LOWER COURT'S ERRONEOUS JURY INSTRUCTIONS ON KNOWLEDGE

In instructing the jury with respect to the element of knowledge under 18 U.S.C. § 1708,* the district court charged:

> You may also find the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen but with a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks.
>
> (Ex. F, 22).

This was the district court's initial instruction with respect to the element of knowledge under 18 U.S.C. § 1708. Defense counsel had requested an instruction that the jury must acquit appellant if it concluded that she actually believed the checks were not stolen, even though such belief was

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* While each count of the indictment charged appellant with violations of both 18 U.S.C. §§ 1702 and 1708, no evidence was introduced at trial with respect to the crime of obstruction of correspondence under 18 U.S.C. § 1702. Furthermore, the district court did not instruct the jury with respect to the elements of such offense. Accordingly, although the final judgment entered below purports to find appellant guilty under both §§ 1702 and 1708, appellant's conviction on counts 6, 7 and 12 of the original indictment can only be sustained under 18 U.S.C. § 1708.

foolish.* Such instruction was not given.

In the course of its deliberation, the jury sent the following note to the court:

> Request clarification of term "reckless disregard" as pertains to whether defendant had knowledge of whether checks were stolen.
>
> Also - can that be stipulated as part of the verdict?
>
> (Ex. F, 33).

With one minor, but significant, variation the district court's response to the jury's note was a mere reiteration of the original instruction:

> You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen or were [sic] a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks.
>
> Now, with respect to the second part of your note, which reads as follows, "Also, can that be stipulated as part of the verdict?" the answer to that is no. Your verdict must be either guilty or not guilty. (emphasis added).
>
> (Ex. F, 39-40).

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* Defendant's Request No. 5:

KNOWLEDGE

A defendant who believes that stolen mail is not stolen must be acquitted. The Government has the burden of proving that the defendant knew that the checks were stolen. It is not enough to sustain that burden to merely demonstrate that the defendant's belief was a foolish one. See, U.S. v. Jacobs, 475 F. 2d 270, 287 (2d Cir. 1973).

Neither the prosecution nor the defense had requested an instruction equating knowledge with reckless disregard or conscious avoidance of the truth. In any event, less than two hours after the district court gave this erroneous instruction, the jury returned its verdict against the appellant.

IV. ARGUMENT

> "As legislation proliferates and judicial decisions multiply, our criminal law daily takes on increased complexity and sophistication. Subtle distinctions are constantly drawn; more perfect refinements continue to evolve. At the same time, however, there are a small number of more basic questions which cut across the whole of this evolutionary process, questions so fundamental to the very notion of criminal justice that they must continue to be asked -- and, insofar as possible, answered -- if the criminal law is truly to reflect the moral sense of the community. This appeal poses one of those questions." United States v. Freeman, 357 F.2d 606, 607-08 (2d Cir. 1966).

POINT I

A. THE DISTRICT COURT'S ERRONEOUS EXCLUSION OF THE PROFFERED PSYCHIATRIC TESTIMONY VIOLATED FUNDAMENTAL PRINCIPLES OF LAW AND ABRIDGED APPELLANT'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Although at first blush this case may appear to involve a novel issue, appellant's position is based upon legal principles which trace their origins back to the early beginnings of codified law. Appellant was prepared to offer in evidence a psychiatrist's expert opinion that she suffered from a passive-dependent mental condition which effectively made her incapable of knowing that the welfare checks which Scott gave her had been stolen.* Appellant believes that it can, and should be, inferred that the jury found her guilty because the circumstances were such as to have "tipped-off" a normal individual to the fact that the three checks here in issue were stolen. Dr. Weiss was prepared to testify that appellant was not such a normal person and that she suffered from a recognized mental disorder or defect which prevented her from formulating suspicions about Scott and his checks. Testimony to this effect would have gone far to explain appellant's seemingly foolish, even reckless conduct in depositing Scott's checks

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* Appellate counsel representing Catherine Bright interviewed Dr. Weiss and verified that his opinion is unchanged.

in her own bank accounts while making no attempt at concealment. Dr. Weiss' testimony was a critical element of the defense which appellant sought to present. By excluding this evidence, the district court deprived appellant of her fundamental common law right to present a defense to the charges against her, and thereby also abridged her rights under the Fifth and Sixth Amendments to the Constitution of the United States.

Under the Fifth and Sixth Amendments to the Federal Constitution, a defendant is guaranteed the right to due process of law in a criminal trial. This means the right to a fair opportunity to defend oneself against allegations of wrongdoing. An integral component of such defense is, of course, the right to have witnesses testify on one's behalf. As noted by the Supreme Court in Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973):

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver, 333 U. S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."
>
> . . . .

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.

And, in Washington v. Texas, 388 U.S. 14, 19 (1967), Mr. Chief Justice Warren wrote in a similar vein:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Appellant herein seeks from this court no more than the protection of her constitutional right. The practical effect of the district court's ruling was to prevent appellant from defending herself. Appellant does not believe this court will countenance a conviction so secured.

The words of Professor Perkins are relevant in this regard:

> A statute would be clearly invalid . . . stating the obvious for purposes of emphasis, if it prohibited the defense from introducing evidence to establish an alibi.
>
> R. Perkins, Criminal Law 809 (2d ed. 1969) [hereinafter cited as "Perkins"].

No less tainted is the ruling of the district court which precluded appellant from effectively defending herself and

thereby abridged her constitutional rights.*

In addition, by excluding Dr. Weiss' testimony, the district court usurped the proper function of the jury. Appellant submits that jury accessability to the evidence is the touchstone of the fair administration of justice. Not only does such access ensure protection of both common law and constitutional rights, but it also ensures that criminal responsibility will be assessed by the appropriate party, the finder of fact--here the jury:

> Whether the old or the new medical theories are correct, is a question of fact for the jury; it is not the business of the court to know whether any of them are correct. The law does not change with every advance of

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* Counsel for appellant notes that if the jury had been permitted to hear the testimony of Dr. Weiss and had believed that testimony, a verdict of acquittal may have been mandated under the Eighth Amendment to the Constitution of the United States.

> We would forget the teachings of the Eighth Amendment if we . . . permitted sick people to be punished for being sick.
>
> Robinson v. California, 370 U.S. 660, 678 (1962) (concurring opinion).

To punish appellant for an act she could not have known was criminal would shock public sentiment and violate the judgment of sensible men. Cf., Weems v. United States, 217 U.S. 349, 375 (1910). See, Greenawalt, "Uncontrollable" Actions And The Eighth Amendment: Implications of Powell v. Texas, 69 Colum. L.Rev. 927 (1969).

> science; nor does it maintain a fantastic consistency of adhering to medical mistakes which science has corrected.
>
> State v. Pike, 49 N.H. 399, 438 (1869).*

The district court's ruling in practical effect denied the jury the opportunity to fairly assess the guilt or innocence of appellant:

> A proper adjudication requires that the jury be fully informed about the defendant's mental and emotional processes and, insofar as it affects these processes, his social situation. Of course, we cannot hope to obtain all the relevant information about a defendant. We cannot explore in full the effects of his genetic structure, his family relationships, his upbringing in slum or suburb. But within the limits imposed by the courtroom context and the level of scientific knowledge we should provide the jury with as much of this information as is reasonably available. (footnotes omitted) (emphasis in original).
>
> Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967).

Decisions which support the government's position seem to be based upon a fear that the psychiatrist will take over the courtroom - that medical judgment will be substituted for the judgment of the jury. The simple answer to this fear is that the psychiatrist is in court for the sole purpose of aiding the jury to reach an informed decision:

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* Overruled on other grounds, Hardy v. Merrill, 56 N.H. 227 (1875).

> Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect.
>
> . . .
>
> We emphasize that, since the question of whether the defendant has a disease or defect is ultimately for the triers of fact, obviously its resolution cannot be controlled by expert opinion. The jury must determine for itself, from all the testimony, lay and expert, whether the nature and degree of the disability are sufficient to establish a mental disease or defect . . . . (footnote omitted).
>
> McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).

See also, Davis v. United States, 160 U.S. 469 (1895).

Counsel is not unaware of the difficulties inherent in the presentation of psychiatric testimony. However, these difficulties are already present in well recognized areas of the law (e.g., the "insanity defense"). Their presence provides no basis for denying justice to appellant; likewise, they provide no grounds for judicial refusal to permit the jury to consider facts which can be established by medical science and which bear directly on the guilt or innocence of an accused. Furthermore, if trial counsel are diligent, they can substantially reduce the danger that the jury will be confused by the testimony of medical experts. As the Court of Appeals for the District of Columbia has said:

> We have gone to great effort . . . to restore the issue of criminal responsibility as one of fact for the jury and to make it clear that the expert's label is relatively

> unimportant but that his description and explanation of capacity to control behavior are critical. We have frequently urged that trial counsel and their expert witnesses should seek to avoid being content with mere expert conclusions and should emphasize the reasons, the factors, the symptoms, and the medical reasoning which led to the conclusions so that from the experts the jury will have a psychological profile of the accused and not simply a collection of psychiatric labels and technical jargon.
>
> Heard v. United States, 348 F.2d 43, 45 (D.C. Cir. 1964).

The person charged with a crime is entitled to have all relevant evidence submitted for the consideration of the jury. Appellant does not seek to replace the jury verdict with a medical one - to the contrary, she is quite content to rely on the common sense of her peers. See, United States v. Freeman, 357 F.2d 606, 619-20 (2d Cir. 1966).

B. THE ADMISSIBILITY OF PSYCHIATRIC TESTIMONY TO ESTABLISH LACK OF CRIMINAL RESPONSIBILITY IS A WELL SETTLED PRINCIPLE OF LAW; THE DISTRICT COURT ERRED BY EXCLUDING SUCH TESTIMONY.

The principle that punishment will be meted out only to individuals who consciously seek to break the law lies at the very heart of the American system of criminal justice. This concept "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Morissette v. United States, 342 U.S. 246, 250 (1952) (footnote omitted). Indeed, it has been the bedrock of all sophisticated systems of law.*

Legal scholars often separate criminal capacity into two essential elements: actus reus, the ability to choose between alternatives, and mens rea, the ability to understand

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* Cf., Aristotle, Nichomachean Ethics, Bk. III, ch. i, at 200 (Odyssey Press 1951):

> But it is only when a man feels or acts willingly that he deserves praise or blame; feelings or actions that are unwilling are pardoned or even pitied. To distinguish willing from unwilling conduct, therefore, is presumably incumbent upon students of ethics, and will also be of service to legislators in meting out honors and punishments.

the moral consequences of those alternatives and to choose between them on that basis. See, e.g., Foster, What Psychiatrists Should Know About the Limitations of Law, 1965 Wis. L. Rev. 189, 226-227 (1965). Whatever the formulation, the law will not punish one who cannot choose right from wrong, much less one who is incapable of knowing that there is a choice to be made:

> The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good . . . .
>
> Sayre, Mens Rea, 45 Harv. L. Rev. 974, 1004 (1932).

The evidence which appellant sought to introduce at trial would, if believed, have established that she was not capable of knowing that her acts were criminal; accordingly, she is not subject to punishment:

> An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action.
>
> Easter v. District of Columbia, 361 F.2d 50, 52 (D.C. Cir. 1966).

> When a person possessing capacity for choice and control, nevertheless breaches a [legal] duty . . . he is subjected to the sanctions of the criminal law. He is subjected to these

> sanctions not because of the act alone, but because of his failure to exercise his capacity to control his behavior in conformity with the demands of society. . . . Thus, the sanctions of the criminal law are meted out in accordance with the actor's capacity to conform his conduct to society's standards. . . .
>
> It follows, we believe, that where there is a reasonable doubt as to whether a particular person possesses capacity of choice and control, i.e., capacity to conform his conduct to society's standards there is a reasonable doubt as to whether he possessed the necessary guilty mind.
>
> United States v. Currens, 290 F.2d 751, 773 (3d Cir. 1961).

The oldest, and certainly the most common instance in which the defense of lack of criminal responsibility has been asserted has been where the defendant seeks to be excused from criminal sanctions because he is insane. An insane person, possessing neither the capacity to exercise a choice between good and evil, nor the ability to control the offending conduct is not, under our system of law, answerable for his conduct:

> To understand the defense of insanity one must keep constantly and clearly in mind the basic postulate of our criminal law - in the words of Dean Pound, quoted by Justice Jackson in Morissette, "a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong". If a man . . . is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely, he is outside the postulate of the law of punishment. (footnote omitted).
>
> Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1956).

And, while "insanity" is the most common defense asserted under the principle of lack of criminal responsibility, it is by no means the only one. Thus, duress,* sleepwalking,** the influence of medication,*** epilepsy,**** youth,***** kleptomania,****** alcoholism,******* and drug dependence******** have all been recognized as defenses under this fundamental principle. All produce involuntary behavior not punishable under common law.

Since before Hale's Pleas of the Crown (circa 1675), the defense of lack of criminal responsibility by reason of insanity has been a well recognized principle of common law. For many years the defense in this country was customarily defined in terms of the rules laid down in M'Naghten's case.********* Beginning in 1954, the United States Court

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* E.g., Martin v. State, 31 Ala. App. 334, 17 So.2d 427 (1944).

** E.g., Bradley v. State, 102 Tex. Cr. Rep. 41, 277 S.W. 147 (1925).

*** E.g., Pribble v. People, 49 Colo. 210, 112 P. 220 (1910).

**** E.g., People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (1943).

***** E.g., Allen v. United States, 150 U.S. 551 (1893).

****** E.g., State v. McCullough, 114 Ia. 532, 87 N.W. 503 (1901).

******* E.g., State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969); Easter v. Dist. of Columbia, 361 F.2d 50 (D.C. Cir. 1966) (en banc).

******** Cf., United States v. Ashton, 317 F.Supp. 860 (D.D.C. 1970).

********* 10 Clark & Fin. 200 (1843).

of Appeals for the District of Columbia began refining the M'Naghten rule in an attempt to remove the shackles of legal definitions from the testimony of expert medical witnesses.* The court's undertaking was long overdue. As far back as 1869, Judge Doe of New Hampshire had warned that obsolete medical terminology could, by forming the basis for legal rulings, become a roadblock to the growth of law:.

> Defective medical theories [have] usurped the position of common-law principles.
>
> The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent is medicine and not law, the reverence in which it is held, will, in the course of time, subside.
>
> State v. Pike, 49 N.H. 399, 438 (1869).**

Remarkably, few courts heeded this warning. Indeed, M'Naghten's rule remained the law in this jurisdiction until 1966. In that year, this court handed down its decision in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

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* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled, United States v. Brawner, infra; Carter v. United States, 252 F.2d 608 (D.C. Cir. 1956); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962); Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

** Overruled on other grounds, Hardy v. Merrill, 56 N.H. 227 (1875).

In the Freeman case, the defendant was accused of having sold heroin. He admitted the sale but asserted that he lacked the mental capacity to have the intent necessary for him to be held criminally responsible. He alleged that he lacked this mental capacity because years of narcotics addiction and alcoholism had dulled his senses. The evidence introduced by the defense consisted largely of the testimony of psychiatrists.

The standard applied by the trial court to Freeman's defense was M'Naghten's rule. In considering whether such rule should continue to be the law of this jurisdiction, this court stated:

> We are here seeking a proper test of criminal responsibility. That we are not instead deciding the initial question -- whether lack of such responsibility, however defined, should be a defense in criminal prosecutions -- itself seems significant and worthy of at least some brief comment.
>
> The criminal law, it has been said, is an expression of the moral sense of the community. The fact that the law has, for centuries, regarded certain wrong-doers as improper subjects for punishment is a testament to the extent to which that moral sense has developed. Thus, society has recognized over the years that none of the three asserted purposes of the criminal law -- rehabilitation, deterrence and retribution -- is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions are punished.

> What rehabilitative function is served when one who is mentally incompetent and found guilty is ordered to serve a sentence in prison? . . . And how is deterrence achieved by punishing the incompetent? Those who are substantially unable to restrain their conduct are, by definition, undeterrable and their "punishment" is no example for others; those who are unaware of or do not appreciate the nature and quality of their actions can hardly be expected rationally to weigh the consequences of their conduct. (footnotes omitted) (emphasis added).
>
> 357 F.2d at 615.

The court reviewed M'Naghten and some of its antecedents. Noting that M'Naghten's insistence on absolutes was inconsistent with the teachings of modern psychiatry, the court stated:

> 'The law must recognize that when there is no black and white it must content itself with different shades of gray.'
>
> . . .
>
> The tremendous growth of psychiatric knowledge since the Victorian origins of M'Naghten and even the near-universal disdain in which it is held by present-day psychiatrists are not by themselves sufficient reasons for abandoning the test. At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical but a legal, social or moral judgment. Ideally, psychiatrists -- much like experts in other fields -- should provide grist for the legal mill, should

> furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused -- his characteristics, his potentialities, his capabilities. But once this information is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts. In so deciding, it cannot be presumed that juries will check their common sense at the courtroom door. As Professor Wechsler has rightly commented, 'It's not to be expected that juries will lightly accept the proposition that one who seemingly knew in a true sense did not know. One would expect jury skepticism and the system is the healthier for that jury skepticism.' (footnotes omitted).
>
> 357 F.2d 618-20.

After reviewing Durham* and other authorities, the court in Freeman adopted Section 4.01 of the Model Penal Code** as the law of this circuit. 357 F.2d at 623.

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* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

** "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

Subsequent to Freeman, the United States Court of Appeals for the District of Columbia again had occasion to consider the appropriate standards to be applied to the defense of lack of criminal responsibility. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Like this court, the court in Brawner adopted the formulation embodied in the Model Penal Code. 471 F.2d at 973.

After having adopted Section 4.01 (with some modification) as the law of the circuit, the court in Brawner proceeded to consider certain interrelated doctrines. One of these was whether trial courts should permit the introduction of evidence of mental condition, short of the defense of insanity, as a defense to a crime. Concluding that they should, the District of Columbia Court of Appeals stated:

> Our decision accompanies the redefinition of when a mental condition exonerates a defendant from criminal responsibility with the doctrine that expert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime. . . .
>
> Some of the cases following this doctrine use the term "diminished responsibility," but we prefer the example of the cases that avoid this term . . . for its convenience

is outweighed by its confusion[.] Our doctrine has nothing to do with "diminishing" responsibility of a defendant because of his impaired mental condition, but rather with determining whether the defendant had the mental state that must be proved as to all defendants. (footnote omitted).

471 F.2d at 998.

The Brawner court, noting that many jurisdictions followed the rule which it was adopting, further noted:

> The pertinent reasoning was succinctly stated by the Colorado Supreme Court as follows:
>
> > The question to be determined is not whether defendant was insane, but whether the homicidal act was committed with deliberation and premeditation. The evidence offered as to insanity may or may not be relevant to that issue. * * *" A claim of insanity cannot be used for the purpose of reducing a crime of murder in the first degree to murder in the second degree or from murder to manslaughter. If the perpetrator is responsible at all in this respect, he is responsible in the same degree as a sane man; and if he is not responsible at all, he is entitled to an acquittal in both degrees. However, . . . evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances, may be introduced, not for the purpose of establishing insanity, but to prove that the situation was such that a specific intent was not entertained . . . ."(emphasis in original) (footnote omitted).
>
> 471 F.2d at 1000-01.

The court concluded:

> Our rule permits the introduction of expert testimony as to abnormal condition if it is relevant to negative, or establish, the specific mental condition that is an element of the crime.
>
> 471 F.2d at 1002.

This reasoning of the Brawner court should apply with equal force to the case at bar.

In the Freeman case, this court adopted an enlightened approach to the law of criminal responsibility. The tests laid down in Freeman served notice that this court was receptive to "the reexamination of old beliefs in the light of new learning and the contemporary state of public enlightenment."* Unfortunately, the district court in this case chose not to follow the direction in which Freeman pointed. Instead, it fell into the trap of the "all or nothing approach" to the concept of criminal responsibility. See, Annotation, Mental or Emotional Condition as Diminishing Responsibility for Crime, 22 A.L.R.3d 1228 (1968) [hereinafter cited as "Annotation"].

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* Address by Judge Charles M. Merrill of the U.S. Court of Appeals for the Ninth Circuit, "Some Reflections on the Business of Judging," Sept. 22, 1965, luncheon meeting of Harvard Law School Ass'n in connection with annual meeting of State Bar of California, reprinted in 40 J. St. B. of Cal. 814 (1965).

In accepting the government's argument that the law of "insanity" covers the entire field of criminal responsibility, the district court ignored the many other categories of this defense. More fundamentally, the court failed to recognize that these categories are mere legal shorthand, useful to designate various types of disabilities often associated with lack of criminal responsibility, but, of themselves, without substance. The district court thus ignored the fact that the "insanity" defense is not really the "insanity" defense but the common law defense of lack of criminal responsibility.*

Appellant's position has been recognized in one form or another in the majority of American jurisdictions.** T. Lewin, Mental Disorder and the Federal Indigent, 11 S. Dak. L. Rev. 198, 246 (1966) [hereinafter cited as "Lewin"]. See United States v. Brawner, 471 F.2d 969, 1000-02 (D.C. Cir. 1972); Annotation, supra, 1238 et seq.

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* See, e.g., United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

** As noted by the court in United States v. Brawner, 471 F.2d 969, 1001 (D.C. Cir. 1972):

> On the other side of the coin, very few jurisdictions which have recently considered this question have held to the contrary position.

As noted by the court in Rhodes v. United States, 282 F.2d 59, 60 (4th Cir. 1960) (footnote omitted):

> While it is true that the defense of insanity was not advanced it was still open to the defendant to introduce psychiatric testimony to show that by reason of his mental condition he was unable to form the requisite intent or mens rea which is an essential element of the crime charged.

In the instant case, the government had to prove not only mens rea but also that the appellant had actual knowledge that the checks were stolen. And, as stated by the court in Rhodes:

> An intent beyond the mere doing of the act is not invariably required. Where, however, it is inherent in the offense, or the statute creating it prescribes as part of the definition that a specific state of mind shall accompany the act, as this statute does, a full exposition of the pertinent evidence is permitted if properly tendered.
>
> Long ago this was treated as established doctrine in Hopt v. People, 1881, 104 U.S. 631, 26 L.Ed. 873, . . . Psychiatric testimony, if it has a bearing upon this issue, has a rightful place in the record.
>
> 282 F.2d at 60-61 (footnotes omitted).

The court in People v. Gentry, 65 Cal. Rptr. 235, 238 (1968), remarked in a similar vein:

> Lack of specific intent to defraud may be shown by adducing proof of diminished mental capacity upon a not guilty plea. A "plea of

not guilty puts in issue every material allegation of the accusatory pleading" (Pen. Code, § 1019), and when a specific kind or particular type of mental state or intent is a part of the corpus delicti of the crime charged, the not guilty plea puts in issue the existence of that state of mind.

"It has long been settled that evidence of diminished mental capacity, whether caused by intoxication, trauma, or disease, can be used to show that a defendant did not have a specific mental state essential to an offense."

The foregoing discussion and citation of authority amply demonstrates that the appellant should have been permitted to introduce evidence to show that she lacked the requisite knowledge to commit the crime with which she had been charged. Perhaps appellant's position is best summed up in the following words of Professor Perkins:

> After all - if the state of mind requisite for guilt of the offense charged was missing, whether because of mental disease or defect or for any other reason, the crime has not been committed. (emphasis added).
>
> Perkins, supra, at 883.

In rejecting appellant's offer of proof, the district court appears to have relied primarily on Curl v. State, 40 Wis. 2d 474, 162 N.W.2d 77 (1968).* (Ex. D, 9).

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* The ruling in Curl appears to represent a minority point of view. See cases cited in United States v. Brawner, 471 F.2d 969, 1000 (D.C. Cir. 1972); Lewin, supra, at 246.

In rejecting a position similar to that advanced by appellant, the Curl court refused to bring the "psychiatrist's couch" into the courtroom. 162 N.W.2d at 83. Appellant contends that the ruling of the Curl court was erroneous for the reasons set forth above. Moreover, such ruling reflects a view of medical science at variance with the mores of today's society and contrary to the position of the organized bar. See, Psychiatry and the Dilemmas of Dual Loyalty, 60 A.B.A.J. 1521 (1974).

In relying on Curl, not only did the district court lean on a weak reed, but it chose to ignore the law of New York. That psychiatric testimony should be admitted on the question of determining criminal liability was established as a principle in this State in 1928. People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928). Recently, the Appellate Division reaffirmed this position. People v. Colavecchio, 11 App. Div. 2d 161, 202 N.Y.S.2d 119 (4th Dep't 1960). In the Colavecchio case, the court held that it was error to exclude psychiatric testimony offered for a purpose analogous to that in the case at bar. The court stated:

> The defense should have been permitted to place in evidence the testimony of the psychiatrist, who had recently examined appellant. The trial court was of the opinion that the testimony must be relevant to a defense under section 1120 [the crime of grand larceny] of the Penal Law to establish that defendant was laboring under such a defect of reason as not to know the nature and quality of the act he was doing and not to know that the act was wrong.
>
> . . .

> In the comment to [Model Penal Code § 4.02 (Tent. Draft No. 4)] it is said in part that 'If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence.'
>
> In the posture in which this appeal comes to us we conclude that the rejected testimony was admissible not for the purpose of exempting defendant from criminal responsibility under the insanity test, but as bearing upon the question of whether he possessed, at the time he committed the act, the necessary criminal intent proof of which was required to convict under the first count of the indictment.
>
> 11 App.Div.2d at 164-65, 202 N.Y.S.2d at 122-23.

The other case upon which the government (and presumably the district court) relied in its argument to exclude the proffered psychiatric testimony was United States v. Pawlak, 352 F. Supp. 794 (S.D.N.Y. 1972). The defendant in Pawlak was charged with income tax evasion. Defendant's psychiatrist testified in his behalf. It is true, as the government contends, that Judge Tenney stated that it was the law of this jurisdiction that the testimony of the psychiatrist was not admissible solely on the issue of willfulness. 352 F. Supp. at 801-02. However, the cases in this circuit cited by Judge Tenney (United States v. Baird, 414 F.2d 700 (2d Cir. 1969), cert. denied 396 U.S. 1005 (1970) and United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971)) simply do not support this position. Furthermore, Judge Tenney did hear testimony of the psychiatrist and his rejection of

that testimony appears to have been based on more practical than legal grounds:

> There is an additional and more fundamental reason, however, for rejecting Dr. Ruddick's testimony. The Doctor testified that the basis for his conclusion that defendant did not act willfully constituted a minimal part of his analysis of Mr. Pawlak and furthermore, Doctor Ruddick was a very biased witness, and much of his testimony just cannot be believed.
>
> 352 F. Supp. at 802.

Indeed, in United States v. Baird, 414 F.2d 700 (2d Cir. 1969), cited by Judge Tenney in support of his position, a psychiatrist was permitted to testify at length concerning defendant's mental capacity to form a willful intent and to exercise that intent. The central issue on appeal in the Baird case was not the admissibility of the testimony of defendant's psychiatrist, but rather the constitutionality of the appointment of a psychiatrist by the government to examine the defendant and the testimony he gave at trial. 414 F.2d at 706.

The other case cited by Judge Tenney, United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971), is irrelevant. In that case the offered testimony was that of two doctors, neither of whom was, or was called as, an expert in the field of psychiatry.

Thus, it appears that, with the exception of appellant's case, the courts of this circuit and this state have

admitted expert psychiatric testimony on the issue of intent when it has been offered. In view of the precedent cited above, the exclusion of such evidence by the district court constituted substantial error adversely affecting the right of the appellant to defend herself; accordingly, the conviction below must be reversed.

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ERRONEOUSLY INSTRUCTING THE JURY WITH RESPECT TO KNOWLEDGE UNDER 18 U.S.C. § 1708

The issue of knowledge was the only issue, and thus the critical issue, in dispute at appellant's trial. The district court charged the jury that it could find that appellant had the requisite guilty knowledge to support a conviction under 18 U.S.C. § 1708 if she acted with reckless disregard.* In the words of the district court:

> You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen or were [sic] a conscious effort to avoid learning

---

* This charge was in response to the jury's note to the district court and the second instruction on the element of knowledge. See, FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW, supra, at 9.

> the truth, even though you may find she was not specifically aware of the facts which would establish the stolen character of the checks. (emphasis added).
>
> (Ex. F, 39-40).

By allowing the jury to equate reckless disregard of the facts with criminal knowledge, the district court established a standard of criminality perilously close to negligence. Such a standard is, plainly, erroneous. Reckless disregard alone cannot serve as the basis for a finding of criminal knowledge.* United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973), cert. denied sub. nom. Thaler v. United States, 414 U. S. 821 (1973). In the Jacobs case, the court did approve a charge on the element of knowledge which included the words "reckless disregard". However, the trial court had made it clear to the jury that recklessness alone was not sufficient and that it had to be coupled with a conscious purpose to avoid learning the truth in order to sustain a finding of criminal knowledge. 475 F.2d at 287-88. Guilty knowledge cannot be established by demonstrating reckless disregard unaccompanied by conscious purposefulness. 475 F.2d 287. By instructing the jury to the contrary in the case at bar, the district court committed reversible error.

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* Appellant is aware of no analogous case in which "reckless disregard for the truth" has been approved as an exclusive basis for criminal liability where "knowledge" is an essential element of the crime. Unlike the individual who consciously avoids the truth, the individual who recklessly disregards it fails to display that element of deliberation required to establish mens rea. Cf. Morissette v. United States, 342 U.S. 246, 260-61 (1952). He does not turn his eyes from the truth, for his eyes are already shut. "[W]rongdoing must be conscious to be criminal . . . ." Morissette, supra, at 252.

The magnitude of such error is manifested by the note from the jury to the court which focused exclusively on the term "reckless disregard" and which inquired whether a verdict could be stipulated on the basis that the jury's finding was one of "reckless disregard." (Ex. F, 33). The district court responded by giving the erroneous instruction noted above. Less than two hours after the court gave this instruction, the jury returned its verdict of guilty. The jury's inquiry and the proximity between the court's erroneous instruction and the return of the jury's verdict can leave no doubt as to the substantial and prejudicial effect of such instruction.

Appellant also requested an instruction to the effect that if the jury found that she actually believed the checks were not stolen, she should be acquitted. The district court's failure to give the requested charge compounded the error manifested in the charge on knowledge which was given.

Although the requirement of "knowledge" as an element of an offense has been variously defined, the Model Penal Code sets forth a generally accepted definition:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist. Model Penal Code § 2.02(7) (Proposed Official Draft, 1962).

This definition has been approved by the Supreme Court. Leary v. United States, 395 U.S. 6, 46 n.93 (1969).

This court has consistently held that where knowledge of a fact is an essential element of a crime and the defendant entertains an actual belief contrary to fact, no amount of recklessness will permit a criminal conviction. United States v. Olivares-Vega, 495 F.2d 827 (2d Cir. 1974); United States v. Brawer, 482 F.2d 117, 128 (2d Cir. 1973); United States v. Jacobs, 475 F.2d 270 (2d Cir. 1973), cert. denied sub. nom. Thaler v. United States, 414 U. S. 821 (1973); see also Perkins, supra, at 777. The trial court should have so charged.

For example, in the Olivares-Vega case, the defendant was found guilty of importation and possession of cocaine. It was incumbent upon the government to establish that the defendant knew that what he had in his possession was in fact cocaine. This court approved the following instruction:

> If . . . you find that the defendant believed that what was in the suitcase was not cocaine or any other narcotic drug, then you must acquit the defendant on both counts.
>
> 495 F.2d at 830, n. 10.

The defendant who entertains an actual belief contrary to the true facts, even a reckless belief, lacks knowledge of those facts; the genuineness of his belief forecloses consciousness of wrongdoing.

By its instructions to the jury and its ruling excluding the proffered psychiatric testimony, the district court plunged a judicial knife into the heart of appellant's defense. Appellant was denied her right to a fair trial. Evidence which was relevant, indeed crucial, to the question of whether she acted with criminal intent was withheld from the jury. No erosion of the right of a citizen to defend himself against the state can be tolerated. On this principle there can be no compromise.

V. Conclusion

For each of the foregoing reasons, the judgment rendered in the trial court below should be reversed.

Dated: New York, New York
January 27, 1975

Respectfully submitted,

J. Truman Bidwell, Jr.
30 Rockefeller Plaza
New York, New York 10020

Of Counsel:

Mark A. Saunders
George T. Hayum

APPENDIX

A-1

ONLY COPY AVAILABLE

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U. S.:*
vs.	Joel N. Rosenthal, AUSA
[illegible] FRIGHT	264-6421
	For Defendant:

	AMOUNT		CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	[illegible]
[illegible] mail.						
[illegible]elve (Counts)						

DATE	PROCEEDINGS
[illegible]	Filed indictment.
[illegible]	[illegible] Plead not guilty. [illegible] Motley, J.
[illegible]	Filed notice of readiness for trial.
[illegible]	Filed defendant notice of motion for a bill of particulars [illegible] of [illegible]
[illegible]	[illegible] in response to motion for bill of particulars [illegible]
[illegible]	[illegible]

ONLY COPY AVAILABLE

A-2

[illegible] 2?7 -2- Motley, J.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
8-22-74	Conference held...trial set for 11-4-74 at 10 a.m.....Motley,J.		
[illegible]-74	Filed affdvt.& notice of motion directing that defense counsel be permitted to be present at any psychiatric examination of deft....Ret.9-[illegible]-74		
[illegible]-74	Filed memo endorsed on motion of 9-3-74...The within motion[illegible] [illegible]. Motley, J.....[illegible] filed notice.		
[illegible]-74	Filed Govts. memorandum of law.		
[illegible]-74	Filed defts Affidavit & Notice of Motion for an order dismissing counts [illegible] and [illegible] [illegible] etc. as indicated, retble before Motley, J. on [illegible]-2-74.		
[illegible]-74	[illegible] Jury trial begun...Counts 1,8 & 9 dismissed on Govt's motion.		
[illegible]-74	Trial cont'd.		
[illegible]-74	Trial cont'd & concluded. Verdict GUILTY on cts.6,7 & 12 [illegible] Cts. 2,3,10 & 11....Cts.4 & 5 dismissed on Govt's motion. [illegible] on present bail...S.b. adjd 9? a.m. Nov.6-74...Motley,J.		
[illegible]-74	Filed deft's requests to charge.		
[illegible]-7-74	Filed Govt's requests to charge.		
[illegible]-74	Filed notice of appeal from judgment of Nov.6-74..Copy given to U.S.Atty, and to Legal Aid Society U.S.Court House Foley Sq.N.Y.		
[illegible]-6-74	Filed financial affdvt. of deft...		
11-6-74	Filed Judgment(Atty.Murray Mogel,present)the deft is sentenced to [illegible] on each of counts 6,7 and 12, to run concurrently with each other. [illegible] sentence is suspended. Deft is placed on probation for a period of [illegible] subject to the standing probation order of this Court.....Motley, J...[illegible]		
11-22-74	[illegible] 3,3,4, NOV 6, 1974		
[illegible]-16-74	Filed notice that original record on appeal has been transmitted [illegible]		

(over) Page 3

DATE	PROCEEDINGS
[illegible]	[illegible] Order of December 6,1944 is amended as follows. [illegible] to SIX DOLLARS on each of counts 6,7 and 12, to run [illegible] Execution of sentence is suspended. [illegible] for a period of SIX MONTHS, subject to the [illegible] of this Court. This order of probation is stayed pending [illegible] Dec. 11-29-44

B-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

CATHERINE BRIGHT,

Defendant.

---

74 CRIM. 247

INDICTMENT

74 Cr.

The Grand Jury charges:

On or about the dates hereinafter set forth in the Southern District of New York, CATHERINE BRIGHT the defendant, did unlawfully, wilfully and knowingly have in her possession the contents of certain letters, to wit, City of New York Welfare checks, as set forth below in Counts One through Twelve which had been stolen, taken, embezzled and abstracted from and out of authorized depositories for the United States mails knowing the same to have been stolen, taken, embezzled and abstracted.

Count	Check Number	Payee	Date
1	31533469	Ana Fuentes 746 St. Nicholas Ave Apt 74 A N.Y. N.Y.	May 1, 1972
2	SP 28948915	Henrietta Osborne 476 W 143rd St Apt 8 N.Y. N.Y.	June 1, 1972
3	SP 28948914	Wardell Osborne 476 W 143rd St Apt 8 N.Y. N.Y.	June 1, 1972
4	32944544	Henrietta Osborne 476 W 143rd St Apt 8 N.Y. N.Y.	June 16, 1972
5	32944543	Wardell Osborne 476 W 143rd St Apt 8 N.Y. N.Y.	June 16, 1972
6	34425628	Henrietta Osborne 476 W 143rd St Apt 8 N.Y. N.Y.	August 1, 1972
7	34425627	Wardell Osborne 476 W 143rd St Apt 8 N.Y. N.Y.	August 1, 1972

JMT:bj

Count	Check Number	Payee	Date
8	SP 20978649	David Ma Konnen 475 W. 143 St. New York, N.Y.	June 1, 1972
9	32383029	Josephina Mayora 1722 Amsterdam Avenue Apt. 53B N.Y. N.Y.	June 1, 1972
10	32387872	Restituto Delgado 561 W. 147 St. Apt 51 New York, N.Y.	June 1, 1972
11	33231331	Martha Morales 1480 Popham Ave Bronx, New York	June 16, 1972
12	34457346	Mildred Brunson 476 West 143 St Apt 5 New York, N.Y.	August 1, 1972

(Title 18, United States Code, Sections 1708 & 2)

Foreman

PAUL J. CURRAN
United States Attorney

EXHIBIT B

ONLY COPY AVAILABLE

B-3

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

[illegible]

Defendant.

INDICTMENT

In violation of Title 18, United States Code, Section [illegible]

[illegible]
United States Attorney.

A TRUE BILL

Foreman.

FPI—SS—2-13-71—[illegible]—6950

U. S. DISTRICT COURT
FILED
MAR 14 1974
S. D. OF N. Y.

AUG 12 1974 - Conference Held . Trial Date set for November 14 at 10 a.m.

Status P.T.C. Held
Trial date - 10-7-74
[illegible]

OCT 3 1974 - Trial begun (Jury) [illegible]
[illegible]

Counts 1, 8, 9 dismissed on Govt motion

OCT 8 1974 - Trial continued.

OCT 9 1974 - Trial continued & concluded

Verdict, guilty on counts 6, 7, & 12

not guilty on counts 2, 3, 10, & 11

Counts 4 & 5 dismissed on Govt motion

Jury polled. Deft remanded [illegible]

[illegible]

over

JUDGE MOTLEY

C-1

JUDGMENT AND DER OF PROBATION (Revised Dec. '66) (MC EY, J.) Cr. Form No. 101

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

CATHERINE BRIGHT

No. 74 C 247

On this 6th day of NOVEMBER, 1974, came the attorney for the government and the defendant appeared in person, and[1] by Murray Mogel, Esq.,

IT IS ADJUDGED that the defendant upon her plea of[2] Not Guilty, and a finding of Guilty by a jury,

has been convicted of the offense of unlawfully, wilfully and knowingly having in her possession the contents of three (3) letters, to wit, City of New York Welfare checks, which had been stolen, taken, embezzled and abstracted from and out of authorized depositories for the United States mails knowing the same to have been stolen, taken, embezzled and abstracted (Title 28 U.S.C., Secs. 1708 and 1702) as charged in Counts 6-7 and 12,

and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED[3] the defendant is sentenced to Six (6) Months on each of Counts 6, 7 and 12, to run concurrently with each other. Execution of sentence is suspended. Defendant is placed on probation for a period of Six (6) Months, subject to the standing probation order of this Court

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct herself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Constance Baker Motley
United States District Judge.

Raymond F. Burghardt
Clerk.

[1] Insert "by [name of counsel], counsel" or "without counsel: the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

8

FPI-BI—7-8-72-50M

(Tr. 5-8, 22-27)

Colloquy Concerning Admissibility of
Expert Psychiatric Testimony

* * * * *

Are we going to have a psychiatrist testifying in this case?

MR. ZEDROSSER: Yes, your Honor.

As I indicated the last time I was before the Court, we intend to produce psychiatric testimony bearing upon the mental condition of the defendant at the time of the alleged crime, specifically relating to the element of knowledge, knowledge that the checks were stolen.

And if you may recall, at that time I handed up to the Court a copy of a report by Dr. Weiss, and since that time I've given copies of the report to Mr. Kingham as well.

MR. KINGHAM: I have an application with respect to the psychiatric testimony. I think your Honor will recall that at the time the report was handed up in court, I believe in August, your Honor noted first of all that Dr. Weiss concluded that this defendant did not suffer from any mental disease or any mental illness.

EXHIBIT C

I was not personally furnished with a copy of the report until yesterday and the psychiatrist who was employed by the Government, Dr. Portnow, was able to examine Miss Bright last evening, and his conclusion is diametrically opposed to the conclusion of the defense psychiatrist, which in the normal case might perhaps create an issue of fact for the jury.

However, our position, and I have a memorandum on this for your Honor, is that this testimony with respect to knowledge only, and not asserting the Freeman insanity defense, is totally inadmissible and irrelevant in this Circuit.

Mr. Zedrosser has furnished me also with a memorandum citing U.S. v. Browner, which you can see is in the papers, a D.C. Circuit case, which he cited to the Court, to your Honor, and Browner clearly is not the law in this Circuit.

I would like to hand to your Honor a memorandum now on this point. I am sorry that this does come on the eve of trial, but I was unable to determine exactly what the defense was or would be until I had a copy of Dr. Weiss' report.

MR. ZEDROSSER: I was just given a copy of that memorandum myself. I prepared this very brief one, however

not having read the one that the Government has handed in. I am prepared to address myself briefly, however, to the points that are raised by Mr. Kingham.

THE COURT: All right.

What we plan to do this afternoon, in any event, is to select a jury and make opening statements and we will continue the trial tomorrow.

So we will proceed with that and I'll check into this matter with respect to the psychiatric testimony.

I thought you said initially you were going to call a psychologist, Mr. Zedrosser?

MR. ZEDROSSER: No. A psychiatrist.

THE COURT: And the essence of his testimony is to be what?

MR. ZEDROSSER: The essence of it is that as the result of the abnormal mental condition or mental disorder, she was incapable of knowing that the checks in question were stolen.

THE COURT: Well, that is a plea of not guilty by reason of insanity. Are you making that plea?

MR. ZEDROSSER: I am not. This is simply evidence adduced to oppose one of the elements of the crime which the Government has the burden of proving, to wit, that the defendant knew that the checks were stolen.

jg:mg

This is simply offered, like any other evidence, to negate one of the items the Government has the burden of proof on, and that is the point about the Browner case which I cite and the Rhodes case which I cite in my memorandum.

THE COURT: All right.

As I said, I'll take that up later.

* * * * *

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MR. ZEDROSSER: Your Honor, before we open, has your Honor made any ruling on the motion by the Government on the question of psychiatric testimony, so that I can judge my opening accordingly?

THE COURT: Yes. I just reviewed the charge which was given in the case of United States v.Frederickson, in which a psychologist was permitted to testify about the defendant's state of mind, his mental condition, or emotional condition at the time he filed his tax returns, and I've also reviewed the file in that case to ascertain whether there was a Second Circuit case which formed the basis for the admission of that testimony.

Now, the file revealed that there was a photostatic copy of the D'Anna case, and in the charge there is no reference to the case on which we relied. There is no

indication in the charge.

And so I gather that at the time of the Frederickson case the Government, without argument, conceded that the defendant had the right to put on such testimony and, therefore, there was not an extensive discussion of the problem.

But I've read now the Second Circuit cases cited in the Government's brief, the D'Anna case and the Baird case, and it seems clear that in this Circuit psychiatric testimony on the issue of wilfulness is not admissible short of a defense of insanity. So that would have to be precluded.

MR. ZEDROSSER: Your Honor, yesterday I asked the Court if I could address myself briefly to those cases mentioned by the Government.

THE COURT: All right.

MR. ZEDROSSER: I've looked at the Pollack case, which is a District Court case that the Government cited.

What is interesting about that case is that it was a non-jury case tried by Judge Tenney and at most it comments about the admissibility of psychiatric testimony with an alternative holding, because in that case the judge specifically found that it was a minimal part of the analysis, psychiatric analysis, of the defendant that

related to his condition at the time of the crime, number one; number 2, he specifically found the man was unworthy of belief and indeed was biased, and it was only as an alternative that the Court even dealt with the question of admissibility.

Now, the two cases that are cited there, D'Anna and Baird -- the D'Anna case as I read it was a case that an internist, not even a psychiatrist, couldn't testify as to what the defendant told him where the internist was simply a fact witness and not an expert witness.

THE COURT: Well, are you calling this man as an expert witness?

MR. ZEDROSSER: Surely, your Honor; yes, absolutely, just as we would call an expert psychiatrist on the Freeman defense.

THE COURT: You are saying in the D'Anna case the doctors there were permitted to testify as fact witnesses, to facts which they observed at the time, isn't that so, and not as experts?

MR. ZEDROSSER: Right. The issue was entirely different. The holding was that they couldn't testify as fact witnesses to what the defendant told them, which is an issue that is not here. It didn't even address itself to the question of whether or not an expert

psychiatric witness could testify.

THE COURT: I see.

MR. ZEDROSSER: Now, Baird puzzles me even more because the basic holding in Baird, as I read it, was that it was permissible to order a Government psychiatrist to examine defendant and allow him to testify. That was the basic point in Baird.

And what is even more puzzling is, when you look at Pollack, Judge Tenney's case, you find that when he says a the end, "While there is some authority for defendant's offer of psychiatric testimony" citing Rhodes which I mentioned in my memorandum, and citing Browner in my memorandum, he cites that the law is otherwise in this Circuit but then doesn't cite a Second Circuit case, but a Ninth Circuit case.

So I am a little puzzled by that.

Your Honor, I think that it can't be said that the Second Circuit had ruled to the contrary here. I think that the Browner opinion, which was an exhaustive and very learned one, which went along with the ALI Model Penal Code Review certainly deserves careful consideration here.

I wonder what public policy is served by not allowing psychiatric testimony to be brought to bear on one of the critical elements of the Government's burden of

proof.

THE COURT: Well, I think that is very well stated in the state case cited in the Government's brief.

Is that the Wisconsin case?

MR. KINGHAM: That is correct, your Honor.

THE COURT: The reason for it is stated in that opinion. The Court adopts that view. And I think the issue is settled in U.S. v. Freeman in this Circuit, and there is no authority which you have cited from this Circuit which permits psychiatric testimony on the issue of wilfulness short of a defense of insanity.

So the testimony of the psychiatrist will be excluded.

MR. ZEDROSSER: Your Honor, in order to preserve my right, I wish to make an offer of proof at this time.

THE COURT: All right.

MR. ZEDROSSER: The defendant offers to present the testimony of Norman Weiss, M.D., who is a qualified psychiatrist.

The testimony would be that at the time of the alleged crime the defendant suffered an abnormal mental condition or mental disorder recognized by the American Psychiatric Association as a mental disorder, to wit, passive dependent personality, with aggressive features.

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and that this condition made her unable to know that the checks in question were stolen.

He would also have testified further in a way set forth in two letters, one of which the Court has already seen, both of which I would like to have marked as exhibits for the record.

THE COURT: All right.

MR. ZEDROSSER: It is a letter dated August 22, 1974, to me from Dr. Weiss, and a further letter dated September 28, 1974, to me from Dr. Weiss.

(Defendant's Exhibits A and B marked for identification.)

MR. ZEDROSSER: Thank you, your Honor.

THE COURT: So the record will be clear, there is no insanity defense in this case, is that right?

MR. ZEDROSSER: There is no defense under U.S. v. Freeman, that is correct, your Honor?

MR. KINGHAM: That was the Government's understanding, as well, your Honor.

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NORMAN WEISS, M. D.
50 East 78th Street
New York, N.Y. 10021

Telephone - 861-8168

August 22, 1974

RE: U.S. v. Catherine Bright

Mr. Joseph Zedrosser
Associate Attorney
The Legal Aid Society
15 Park Row
New York, N.Y. 10038

Dear Mr. Zedrosser:

As per your request I examined Ms. Bright in my office yesterday, August 21, 1974. In addition to information obtained during the interview, I read psychiatric and psychological reports from University Consultation Center in the Bronx. The purpose of my examination was to try to answer the following questions. 1) Whether, at the time of the alleged crime, as a result of any mental condition, she did not think that the checks had been stolen; and 2) whether, at the time of the alleged crime, any mental condition impaired her ability to come to a rational conclusion on whether the checks had been stolen.

Ms. Bright described her history in great detail. She told of a young women constantly warding off depression and attempting to meet emotional needs never adequately met at home with her family. A family, which was never able to cope with its own problems which included alcoholism. Her way of dealing with these problems was to turn away from her family and look to those around her. Her pattern, which became a repetitive one, was to overidealize men who came into her life assuming a childlike naivte to the point of self denigration. She would become dependent on these men and unconsciously disregard their shortcomings. This has been most obvious in her relationship with a man whose name is Leslie. She met him at age 13 and he "could do no wrong". This man lived with her for periods of time and was reportedly involved with drugs. The degree of psychological denial used by Ms. Bright is demonstrated by the fact that she lived with Leslie for eight months before becoming aware that he was using drugs. Rather than separating from him at this point she attempted to "cure him". It was through Leslie that she met Freddie the man who allegedly gave her the checks to cash. She said that she was told that these checks were given as payment for monies owed Freddie and Ms. Bright was cashing them as a favor. She believed this stating that no effort was made on her part to cover up. She repeated the statement that she did not believe that either Leslie or Freddie "would do anything to harm me". She said that in retrospect she realized that she had been fooled yet as she left my office she tearfully hoped that she and Leslie could be reunited and all would be better between them.

EXHIBIT E

NORMAN WEISS, M. D.
50 East 78th Street
New York, N.Y. 10021

Telephone - 861-8168

With regards to the first question; though I do not consider Ms. Bright to have been suffering mental illness, I believe that her dependent, childlike character structure unconsciously "needed" to believe that these men would never involve her in illegal activities and that "Leslie could do no wrong." I believe that at the time of the alleged crime, because of this unconscious "need", she did not think that the checks had been stolen.

In response to the next question, for the same reason as stated above, her wish to have an all good, all caring male who would nurture her in ways that she had never before experienced, interfered with her ability to see the situation more objectively. Furthermore, I found no evidence of an anti-social or criminal character structure in this woman. What better characterized her was a depressed, needful person who would do as she was told, without question, in order to get the attention that she so desperately craved.

Sincerely yours,

/s/ Norman Weiss
Norman Weiss, M.D.
Diplomate in Psychiatry

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NORMAN WEISS, M. D.
50 East 78th Street
New York, N.Y. 10021

Telephone - 861-8168

Sept. 28, 1974

RE: U.S. v. Catherine Bright

Mr. Joseph Zedrosser
Associate Attorney
The Legal Aid Society
15 Park Row
New York, N.Y. 10038

Dear Mr. Zedrosser:

In connection with my examination of Catherine Bright on August 21, 1974, you asked me to specifically indicate if I believed that at the time of the alleged crime, as a result of abnormal mental condition or disorder, she was capable of knowing that the checks that she allegedly possessed were stolen. I do not believe that she knew that the checks that she allegedly possessed were stolen as a result of her need to deny the possibility that the men involved would in any way take advantage of her. This passive-dependent personality disorder rendered her incapable of understanding this.

Yours truly,

/s/ Norman Weiss

Norman Weiss, M.D.
Diplomate of Psychiatry

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CHARGE OF THE COURT

(Motley, J.)

Ladies and gentlemen, before formally beginning the charge I want to thank you for your patience and for your cooperation in beingprompt and for the careful attention which you have paid to the testimony and other evidence in this case as it came in. [illegible] that in order to serve on this jury, each of you has had to make some personal or business sacrifice in order to be here, but I believe that I told you when the trial commenced that we all have a stake in the fair and impartial administration of justice and that when you serve on a jury you are playing a vital role in the administration of justice. So I am sure that whatever personal or business sacrifice you had to make in order to serve on this jury, you were glad to do so in the interests of the fair and impartial administration of justice.

Now, also before formally beginning the charge, I would like to thank counsel on both sides for their cooperation and patience with the Court and to congratulate each of them on the high degree of professional skill which each has demonstrated throughout this trial.

Now, ladies and gentlemen, I trust that you wil bear with me now and give me that same degree of attention

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which you have given throughout the trial so that you may carefully understand the legal principles which you are to apply to the facts in this case as you find them.

As you approach the performance of your function in this case, which is to determine the guilt or innocence of this defendant as to a particular count, please remember that it is your duty to weigh the evidence calmly and dispassionately, without sympathy or prejudice for or against either the Government or the defendant. I want to remind you that every defendant appearing before this Court is entitled to a fair and impartial trial, regardless of his or her occupation or station in life. I remind you also that the fact that the Government is a party here, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to a litigation.

Now, by the same token, it is entitled to no less consideration, and that is because under our system all parties, Government and individuals alike, stand equal before the law.

The indictment in this case contains nine separate charges, or counts. We sometimes refer to them as counts. Another word for them is charges. You must therefore return a separate verdict as to each count. And, again

EXHIBIT F

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your verdict with respect to a particular count must be based solely upon the evidnnce which has been presented to you. And, again, the evidence is the testimony, the stipulations and the exhibits actually received in evidence. And I point outthat as to each count your verdict must be unanimous on each count, and your verdict, of course, is either guilty or not guilty as to a particular count.

As jurors, you are the sole and exclusive judges of the facts. Now, that means that you pass upon the weight of the evidence, you determine the credibility of the witnesses who have testified here, you resolve such conflicts as there may be in the evidence, and you draw such reasonable inferences as may be warranted by the testimony and other evidence in the case.

Now, again, with respect to any matter of fact, it is your recollection and yours alone that governs. Anything that counsel for the Government may have said or anything which counsel for defendant may have said with respect to any matter in evidence or any factual matter, whether stated in a question, in argument or in summation, is not to be substituted for your own independent recollection of what the evidence showed. So, too, anything that the Court may have said during the course of the trial or may refer to during the course of these instructions with

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respect to any factual matter is not to be substituted by you in lieu of your own recollection as to what the evidence showed.

Now, the fact that I may refer to some of the testimony during the course of these instructions does not mean that I think that that is the only testimony you should consider or the most important testimony. In deciding the guilt or innocence of this defendant, you must consider all the testimony, both direct and cross examination, and you must consider the contentions of both parties as set forth in their initial statements or in summations to you.

Now, you are not to assume that I have any opinion as to the guilt or innocence of this defendant or the truth or falsity of any of the charges. The fact that I have denied motions or granted motions during the course of the trial is not to be taken by you as any indication that the defendant is believed by the Court to be guilty or innocent. The determination of guilt or innocence is solely for the jury.

Now, these motions, as I told you before, had to do with questions of law and not with questions of fact.

If during the course of the trial a question was asked and an objection interposed and I sustained the objection, you are to disregard the question and any alleged

facts contained in the question. Similarly, if I ruled that an answer be stricken from the record, you are to disregard both the question and the answer.

Now, as you well know, the defendant has entered a plea of not guilty to each charge made against her in this indictment. Consequently, if the defendant is to be convicted on any charge, the Government has the burden of proving that the defendant is guilty of that particular charge beyond a reasonable doubt. It is a burden that never shifts. It remains upon the Government throughout the entire trial.

As I told you before, a defendant does not have to prove his or her innocence. On the contrary, a defendant under our system is presumed to be innocent of any accusation contained in an indictment. Now, this presumption of innocence was in the defendant's favor, as I told you, when the trial started; it continued in her favor throughout the trial; it continues in her favor even as I instruct you now: it remains in her favor during the course of your deliberations in the jury room.

Now, this presumption of innocence is removed only if and when, after your deliberations in the jury room, you are satisfied that the Government has sustained its burden of proof, and that is to prove the defendant guilty

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beyond a reasonable doubt.

Now, the question which naturally comes up is what is a reasonable doubt. The words almost define themselves. Reasonable doubt is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence, the kind of doubt which would make one hesitate to act. It means a doubt that is substantial and not merely shadowy.

Reasonable doubt is one which appeals to your reason, your judgment and your common sense and your experiences in life. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of this defendant as to any particular count, and that you do not have an abiding conviction as to this defendant's guilt, such a conviction as you would be willing to act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you have a reasonable doubt, and in that circumstance it is your duty to acquit the defendant as to that particular count which you are then considering.

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On the other hand, if after such a fair and impartial consideration of all the evidence you can candidly and honestly say that you are satisfied of the guilt of this defendant, that you do have an abiding conviction as to this defendant's guilt, such a conviction as you would be willing to act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt and in that circumstance you may convict the defendant.

Now, a reasonable doubt does not mean a positive certainty or beyond all possible doubt. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact, which by its nature is not susceptible to mathematical certainty. In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Now, there are two classes of evidence recognized and accepted in courts of justice, upon either of which you may find an accused guilty or not guilty. One is called direct evidence, the other is called circumstantial evidence. Direct evidence tends to show the facts in issue without need for any other amplification, although of course there is always the question whether that evidence is to be

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believed. Circumstantial evidence, on the other hand, tends to show other facts from which the fact in issue may reasonably be inferred.

Another way of putting it is it is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true.

For instance, it is sometimes difficult to tell, when you are in a building on a higher floor, by merely looking out of the window and in the street below, whether or not it is raining. But if you go over to the window and you see people passing below with their umbrellas up, you may come to the conclusion that it is raining. You have direct evidence, the evidence of your own senses that the umbrellas are up, and that constitutes circumstantial evidence on which you are entitled to conclude that it is raining. In other words, circumstantial evidence, again, consists of facts proved from which the jury may infer by a process of reasoning other facts in issue.

It is not necessary that the participation of a defendant be shown by direct evidence. Connection may be inferred by such facts and circumstances in evidence as legitimately tend to sustain that inference.

You, as jurors, are the sole judges of the

credibility of the witnesses who testified here and the weight their testimony deserves. Now, you know, of course, that there is no automatic way to determine who is telling the truth and who is not. Credibility can be equated with believability and reliability. If a witness is credible, you say he is believable and reliable. If he is incredible, you say he is unbelievable. There is nothing mysterious about these words.

Now, by what yardstick are you to now judge the credibility of the witnesses? Each of you has given careful attention to the testimony of the witnesses as it came from the witnesses themselves. You observed the witnesses. Issues of fact are presented for your determination, and to a large extent the resolution of them depends upon the credibility which you attribute to the witnesses and the support or lack of support that their testimony received from other evidence in the case.

Your duty is therefore to decide the issues of fact. Use your logic, your reason and your common sense and don't be sidetracked or diverted or distracted by what you consider to be a minor or insignificant detail or irrelevancy, or by what you consider to be an appeal not to your reason or logic but to mere sentimentality or unthinking passion. I repeat, use your common sense.

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You should carefully scrutinize all the testimony given, both direct and cross examination as I said before, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he or she has testified and whether he or she impresses you with having an accurate recollection of these matters.

Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict and, again, the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy

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results from innocent error or intentional falsehood.

In determining credibility and weight to be given to the testimony of any witness, you must consider the testimony of the Government witnesses. The mere fact that they are employees of the Government entitles them to no more and no less consideration than that accorded any other witness. Nor should you be influenced by the number of witnesses a side has called or the number of documents received in evidence. It is the quality of the testimony and other evidence which counts, not the quantity.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you think it deserves.

Now, if you find that any witness, and this applies to all witnesses who testified, has wilfully testified falsely as to any material matter, you may reject the entire testimony of that witness or you may accept such part or portion as commends itself to your belief or which you find corroborated by other evidence in the case.

Now I want to tell you a word about expert witnesses, because we did have one who testified in this case, and that witness gave you testimony concerning his qualifications as an expert in his field. Now, when a case involves a matter of science or art or some field requiring

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special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and the jury. The opinions stated by the expert who testified before you were based on particular fa cts as the expert himself observed them and testified to them before you or based upon facts which the attorney who questioned him asked him to assume.

You may reject an expert's opinion if you find the facts to be different from those which formed the basis for his opinion. You may also reject his opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept the expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability and credibility as the testimony of any other witness. It is given to assist you in reaching a proper conclusion and it is entitled to such weight as you find the expert's qualifications warrant and must be considered by you but is not controlling upon your judgment.

The law does not compel a defendant in a criminal case, as I told you before, to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a

defendant to testify. However, a defendant who wishes to testify may do so and is a competent witness. The defendant's testimony is to be judged in the same way as that of any other witness.

Now, as I told you when the trial commenced and before any testimony began, an indictment is not proof or evidence. And I repeat that now because I am about to read the indictment to you and discuss those elements which you will have to find the Government has established beyond a reasonable doubt before you can find the defendant guilty of any of these charges.

Now, again, an indictment is merely an accusation. It is a method or technique or procedure which we employ in our system whereby one who is accused by a grand jury of a crime is brought into court, and then their guilt or innocence is determined by a petit jury, or a trial jury, such as you are.

Now, as I said, I am going to read the indictment and then I am going to discuss the elements of the crime charged, and each crime is the same except that the payee on the check is different and the date is different, with respect to each count.

"The Grand Jury charges:

"On or about the dates hereinafter set forth,

in the Southern District of New York, Catherine Bright, the defendant, did unlawfully, wilfully and knowingly have in her possession the contents of certain letters, to wit, City of New York welfare checks, as set forth below in counts one through nine, which had been stolen, taken, embezzled and abstracted from and out of authorized depositories for the United States Mail, knowing the same to have been stolen, taken, embezzled and abstracted."

Count one gives a number of a check and a payee, Henrietta Osborne, 476 West 143rd Street, Apartment 8, New York, and the date is June 1st, 1972,

Count two gives a number of the check and the payee is Wardell Osborne, same address, same date.

Count three gives a number of a check, Henrietta Osborne, same address; the date is different, June 16, 1972.

Count four gives a number of a check, Wardell Osborne, same address, June 16, 1972.

Count five, check number, Henrietta Osborne, same address, August 1st, 1972.

Count six, check number, Wardell Osborne, August 1st, 1972.

Count seven, check number, Restituto Delgado, 561 West 147th Street, Apartment 51, New York, N. Y.; the date is June 1st, 1972.

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Count eight, check number, Martha Morales, 1480 Popham Avenue, Bronx, New York, June 16, 1972.

Count nine, check number, Mildred Brunson, 476 West 143rd Street, Apartment 5, New York, N. Y., August 1st, 1972.

Now, the indictment refers to a federal statute which it is claimed has been violated in this case, and that is Title 18, United States Code, Section 1703. That law provides in pertinent part as follows:

"Whoever buys, receives or conceals or unlawfully has in his possession any letter, postal card, package, bag or mail or any other article contained therein which has been stolen, taken, embezzled or abstracted as herein described, knowing the same to have been stolen, taken, embezzled or abstracted, commits a crime."

Now, in order to find the defendant guilty of any charge, you must find that the Government has sustained its burden of proof beyond a reasonable doubt as to each of the following five elements:

First, that a letter and its contents - that is, the check - were deposited in the mail;

Second, that the check was stolen from the mail;

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Third, that the defendant later had the check in her possession;

Fourth, that defendant's possession of the check was knowing and wilful;

Fifth, that at the time she had the particular check in her possession, the defendant knew the check was stolen.

It is not necessary that the defendant knew that the check was stolen from the mail. It is only necessary that the defendant knew that the check was stolen. Now I want to discuss each of those elements separately. And, as I said, each charge is the same, so my discussion relates to each charge in the indictment.

The first fact that you must find beyond a reasonable doubt concerning each check was that it was deposited and it went through the mails, and I believe there was a stipulation read by Mr. Kingham regarding the mailing of the checks.

The second element which you must find beyond a reasonable doubt with respect to each count is that the letter containing the check was stolen from the mails. In this regard you may find that a letter which is properly mailed but never received by the addressee, which is later found in improper hands, has been stolen from the mails,

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in the absence of any other explanation being offered. You need not grasp for improbable explanations as to why the checks were not delivered. You may make a common sense inference from what you find to be the proven facts that the welfare checks which have been mailed, yet were not delivered to the addressees but are later found in the hands of another, were stolen from the mail.

The third element that you must find beyond a reasonable doubt in order to convict the defendant is that the defendant received or possessed these stolen checks. In this connection, the defendant admits that she possessed the checks referred to in the indictment, signed her name to them, and deposited them in her account or cashed them against the account.

Now, with respect to the fourth and fifth elements, the defendant of course denies that she knew the checks were stolen.

The fourth element, as I've said, which you must find is that the defendant acted knowingly and wilfully, that she possessed the checks knowingly and wilfully.

Now, an act is done knowingly if it is done voluntarily and purposefully and not because of mistake, accident, mere negligence or other innocent reason. An act is done wilfully if it is done knowingly, deliberately,

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intentionally and with an evil motive or purpose.

In determining whether a person has acted wilfully, it is not necessary for the Government to establish that that person knew that he or she was breaking any particular law or any particular rule, but it must show a bad purpose or motive on the part of the defendant. Knowledge and wilfulness need not be proved by direct evidence. Like any other fact in issue, it may be established by circumstantial evidence.

The significant fact is the defendant's state of mind. Now, it is obviously impossible to prove directly the operation of a person's mind, because you cannot look into a person's mind and see what his or her intentions are or were. But the proof of the circumstances surrounding a defendant's activities may well supply an adequate and convincing basis for finding that the defendant acted knowingly and wilfully.

In other words, the actions of a person must be set in their time and place, just as the full meaning of a word is often understood only in its relation to other words in a sentence or in its context. So the meaning of a particular act or conduct on the part of a defendant may depend on the circumstances surrounding that act or conduct.

In determining the issue of intent, you are

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entitled to consider any statements made by the defendant which are in evidence and any acts done by the defendant, and all facts and circumstances in evidence which may aid you in determining the defendant's state of mind. You may consider such things as the defendant's age, background and experience and whether such facts make it likely or unlikely, probable or improbable that a defendant fully and precisely understood what he or she was doing in relation to a transaction and, where relevant, in relation to others.

Now, the fifth element which you must find beyond a reasonable doubt before you can find the defendant guilty is that when the defendant possessed a particular check she knew it had been stolen. Again, you need not find that she knew specifically that the check in question had been stolen from the mail but merely that she knew it had been stolen.

Now, the defendant denies that she had this requisite knowledge to sustain her conviction on any charge made against her in this indictment. She claims that she trusted Leslie, who was her boyfriend, and also trusted Freddie, who was Leslie's friend, and accepted his, Freddie's, explanations as to how he came into possession of the checks listed in the indictment.

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The Government, on the other hand, points to circumstantial evidence from which it asks you to infer by a process of reasoning that the defendant did know the checks were stolen. First the Government points to the fact that shortly after the checks had been stolen by someone they were in the possession of the defendant. Next the Government points to the defendant's background and experience. Then the Government points to the portrait of Freddie drawn by the defendant herself when she described him as a hustler. Next the Government points to the fact that the defendant kept two bank accounts, one in her marriage name, the other in her maiden name. Finally the Government points to the fact that the checks were cashed at various branches of the bank around the city.

Before you can find the defendant guilty, as I said, you must find beyond a reasonable doubt that she knew the checks were stolen at the time she possessed the checks. If you find that the defendant did not know the checks were stolen, then of course you must acquit the defendant, find the defendant not guilty.

Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the

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evidence in the case, that the person in possession knew the property had been stolen. However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from possession of recently stolen property.

The term "recently" is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends on the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen and that while recently stolen the contents of said mail - that is, the welfare checks - were in the possession of the defendant, you may draw the inference, as I've said, from those facts that the contents were possessed by the defendant with the knowledge that it was stolen, unless such possession is explained by facts and circumstances in evidence which are in some way consistent with the defendant's innocence. Possession may be

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explained satisfactorily through other circumstances, independent of any testimony of the accused.

You may also find the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen but with a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks.

Now, with regard to each count, if you find that the Government has failed to establish any one of the five elements which I have just enumerated and discussed for you beyond a reasonable doubt, you must acquit the defendant. If, on the other hand, you find that the Government has established each and every one of these elements beyond a reasonable doubt, you may find the defendant guilty.

Now, the jury is not to consider or in any way to discuss or speculate about the punishment which a defendant may receive if found guilty. As I told you before, the function of a jury is to determine guilt or innocence of a defendant on the basis of the evidence and the Court's instructions as to the law. It is then for the Court, or the Judge alone, who has theduty of determining the sentence if there is a conviction.

Now, ladies and gentlemen, the most important

part of this case is the part which you as jurors are now about to play, because it is for you and you alone to determine whether this defendant is guilty or not guilty. I know that you will try the issues which have been presented to you according to the oath which you have taken as jurors. In that oath you promised that you would well and truly try the issues joined and a true verdict render. I suggest to you that if you follow that oath and try the issues without combining your thinking with any emotions, you will arrive at a true and just verdict.

Now, it must be clear to you that once you get into an emotional state and let fear or prejudice or bias or sympathy interfere with your thinking, you will not arrive at a true and just verdict. And, as you deliberate, ladies and gentlemen, please be careful to listen to the opinions of your fellow jurors and ask for an opportunity to state your own views. No one juror holds the center stage in the jury room and no one juror may control or monopolize the discussion.

If after listening to your fellow jurors, and if after stating your own view, you become convinced that your view is wrong, do not hesitate because of pride or stubbornness to change your view. On the other hand, do not surrender your honest conviction solely because of the

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opinion of your fellow jurors or because you are outnumbered.

Now, again, you must return a separate verdict as to each count and your verdict as to each count must be unanimous and must reflect the conscientious conviction of each and every one of you.

All right. Will counsel please approach the bench?

(At the side bar)

MR. ZEDROSSER: Your Honor, at this point I would like to state for the record that I except to the charge to the extent that it differs from my requested charge number one on specific intent and my requested charge on knowledge.

Sepcifically I except to the statement that if you find the defendant did not know, you must acquit, because it tends to eliminate the burden of proof point, which is that in fact you can only convict if the Government convinces you that she did know. It seems to me this puts the issue on the wrong foot. It implies a burden that the defense doesn't have.

Secondly, I specifically except to the part of the charge about reckless disregard, conscious lack of effort to learn even if there is not a specific awareness of the check being stolen.

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Finally, on the question of the marshaling of the evidence, the effect was to marshal the Government's circumstantial evidence and contrasted simply with the flat denial by the defendant. In fact, there was circumstantial evidence, which I attempted in my summation to point out, which also confirmed her flat denials, namely that the accounts were of long standing, that she had money, honest money, in them prior to and during these proceedings, and that she deposited some of her checks, that she dealt with the bank during and after the welfare check incidents and other transactions, and also that the signing of one's own name is not an inherently incriminating act.

THE COURT: Any objections to the charge, Mr. Kingham?

MR. KINGHAM: I have no objections to the charge, your Honor. But with respect to Mr. Zedrosser's exceptions to the charge about reckless disregard, I would like to know whether he excepts to the charge in general or whether he suggests different language to the Court, additional remarks. I am not clear on the ground for the objection on reckless disregard, particularly in light of the evidence.

MR. ZEDROSSER: I just object to giving that charge.

THE COURT: All right.

(In open court)

THE COURT: Ladies and gentlemen, before you go in the jury room, I want to instruct you that you are not to reveal the standing of the jurors, that is, the split of the vote among the jurors, if that should occur at any time, to anyone, including the Court, during your deliberations. And you may send for any of the exhibits which you would like to see or you may have any testimony you desire read back.

Now, at this time I will ask the Clerk to give me the name of the alternate juror so he may be excused.

(Alternate juror excused)

THE COURT: The Clerk will please swear the Marshal.

(A United States Marshal was sworn.)

THE COURT: The jurors will follow the Marshal to the jury room. As you know, it is 12.30 now and your luncheons have been ordered and they will be here at 12.30. So you may proceed to eat your lunch and then proceed with your deliberations in the jury room.

(At 12.28 p.m., the jury left the courtroom to commence their deliberations.)

MR. ZEDROSSER: Your Honor, I am wondering

whether the Court will permit me to wait in the Legal Aid office.

THE COURT: We are going to recess now until 1.30. That will give us an hour for lunch. The jury will probably take half an hour or so for their lunch.

The jury is supposed to have its lunch at 12.30. So we'll return at 1.30, and I suspect that the jurors may want a copy of the indictment or a copy of the checks. So you be back at 1.30.

MR. KINGHAM: Your Honor, I would like to make it clear for the record that, as your Honor and counsel know, the count numbers to which your Honor referred are the count numbers in the redacted indictment, and I will have a copy of the redacted indictment available for the jurors when I return at 1.30.

THE COURT: Here is one right here. But you can bring up another one. I have the redacted one.

That should be marked filed on a certain date. When did we file it? Yesterday?

MR. KINGHAM: It was handed up on the first day of trial, before we picked the jury, which was October 2nd, 1974.

THE COURT: I believe the record will reflect that.

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MR. KINGHAM: We would note that the redacted indictment was not signed and normally filed because it is not a superseding document. It is merely a redaction of the items on the original.

THE COURT: Yes. All right.

(Luncheon recess)

(At 1.50 p.m., in the robing room.)

THE COURT: We have a note from the jurors, which will be marked Court Exhibit 1, and it is difficult to read, but it appears that they want the five elements of each crime charged and they want the nine checks and they want the indictment.

That's the way I construe this. Do you agree, Mr. Zedrosser?

MR. ZEDROSSER: There is a remark after "nine checks" on the second line which I cannot read.

THE COURT: I can't make that out.

MR. KINGHAM: I believe it is an attempt at the word "endorsed," perhaps. But I think it is clear that they are referring to the nine checks in evidence, and I agree with your Honor's interpretation as to the other two items.

MR. ZEDROSSER: I agree with that.

THE COURT: We could have them write it over, send them back and ask them to clarify the note, or bring

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them in and ask them to do that.

All right, bring in the jury.

(Court Exhibit 1 marked.)

(In open court, jury present)

xxx

THE COURT: Ladies and gentlemen, I have your note, which I would like to have clarified as to exactly what you desire. It has been marked Court Exhibit 1, your note.

The first is "Five facts of judgment (law)"?

THE FOREMAN: The five facts that we have to go by according to the law, that we have to prove --

THE COURT: The five elements of the crime charged. All right.

Then you want the nine checks, is that it?

THE FOREMAN: Right.

THE COURT: Then you want the indictment.

THE FOREMAN: The counts, the nine counts.

THE COURT: They are all in one indictment.

Would you hand the clean copy of the indictment, Mr. Clerk, to the Foreman.

And, Mr. Kingham, do you have the nine checks?

MR. KINGHAM: Yes, I have, your Honor.

THE COURT: Now I will reread the portion of the charge which sets forth the five elements which you

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must find the Government has proved beyond a reasonable doubt before you could find the defendant guilty.

THE FOREMAN: Yo'r Honor, they would also like to see those other two pieces of evidence that the prosecution introduced that verified Leslie and Freddie's address on 143rd Street.

MR. KINGHAM: Your Honor, I believe those were used to refresh the recollection of the defendant and were not admitted into evidence.

THE COURT: The other two checks?

MR. KINGHAM: Two other checks marked for identification Government's Exhibits 20 and 21, I believe. They were not admitted but were merely used to refresh the defendant's recollection as to the addresses in question.

THE COURT: Those were the addresses of Leslie and --

MR. KINGHAM: That's correct, the two addresses at which Leslie lived. Perhaps that part of the testimony from the defendant's cross examination can be read back.

THE COURT: Those are not in evidence, as the Government's counsel points out.

In order to convict the defendant on a particular count which you are then considering, you must find beyond a reasonable doubt that the Government established each of

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the five following elements:

First, that a letter and its contents, a check, that is, were deposited in the mail; second, the check was stolen from the mails; third, that the defendant later had the check in her possession; fourth, that the defendant's possession of the check was knowing and wilful; fifth, that at the time she had a particular check in her possession, the defendant knew the check was stolen.

It is not necessary that the defendant knew the check was stolen from the mail. It is only necessary that the defendant knew that the check was stolen.

And then I went on to amplify each one of those elements.

Is that what you wanted read back?

THE FOREMAN: That's what they would like to have.

THE COURT: All right. You may return to the jury room.

(At 1.56 p.m., the jury again retired to continue their deliberations.)

MR. ZEDROSSER: I must say that I am a little bit disturbed about the kind of colloquy that went on in the hearing of the jury about the other two checks. I suppose it is a result of the fact that, unlike most

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situations the jurors were here and asking the question orally. Normally, if they had done that in writing, I guess the answer would have been "It is not in evidence" period. And I think it is unfortunate that the colloquy that resulted, if anything, served to impress upon the jury facts about matters that are not in evidence.

THE COURT: Matters that were not in evidence?

MR. ZEDROSSER: Yes. Matters about items that were not in evidence, to wit, those two checks.

THE COURT: Well, it is in evidence in that the witness' recollection was refreshed. She said that she recalled. I was trying to recall myself what those checks related to.

MR. ZEDROSSER: Right.

THE COURT: I thought one of them related to an address of Leslie and the other related to an address of Freddie. But it turns out they both related to an address of Freddie, is that it?

MR. KINGHAM: No, your Honor. I think, as I tried to make clear before, they both related to an address of Leslie, the first on 143rd.

THE COURT: I misunderstood the whole thing.

MR. KINGHAM: The next on 144th. However, the address on 144th was the same address at which Freddie lived,

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and I think the defendant herself testified to that after seeing the checks and having her recollection refreshed.

THE COURT: All right. I didn't recall what those checks related to and I didn't realize they were not in evidence either. I thought they were.

Anyway, as the jury pointed out, they thought they were in evidence, too. But, anyway, I don't think any harm was d ne because the witness did state that it refreshed her recollection.

(At 2.30 p.m., in the robing room.)

THE COURT: Gentlemen, we have another note from the jurors, which will be marked Court Exhibit 2, and w hich reads as follows:

"Request clarification of term 'reckless disregard' as pertains to whether defendant had knowledge of whether checks were stolen.

"Also - can that be stipulated as part of the verdict? (If possible, for this to be answered in the courtroom.)"

Do you want to look at it and let me have your views?

MR. ZEDROSSER: As far as dealing with the second part first, I gather the answer to that is no because it sounds as if it would be some verdict other than a

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verdict of guilty or not guilty. So the short answer is no.

THE COURT: Yes.

MR. ZEDROSSER: So far as the first part of it is concerned, this pinpoints part of the instruction that I indicated to the Court I was particularly troubled by before, and I reread my notes on the instructions since that time. What troubled me particularly was that the talk of reckless disregard was made without the additional language of the Jacobs case, which I cited in my request to charge in relation to request five, where the Court admittedly did give a charge something like that but also said: "However, if the defendant actually believed that the stuff was not s tolen, then you must acquit." and further said that "mere foolishness or negligence" - both those words were used - "is not enough."

So that even though some language like this was used, it was to some extent counterbalanced by the notion that if it is actual belief, that ends the matter and you acquit.

THE COURT: I don't know what you mean by "actual belief."

MR. ZEDROSSER: In the Jacobs case, the Second Circuit approved a district court ruling where that court spoke of belief, the district court who charged.

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But here, we have one half, from the defendant's point of view the worst half, of that kind of a charge without the other half.

THE COURT: What I am getting at is, after giving that charge, I told the jury that if they should find the Government had failed to establish any one of these elements, and I specifically said if they failed to find that the Government had carried its burden of proof on the question of knowledge, they would have to acquit the defendant. I said it twice. I said it with respect to all elements and, moreover, with respect to knowledge itself.

Do you want to bring the charge from off the desk, Mr. Clerk?

MR. KINGHAM: May I be heard, your Honor?

THE COURT: Just a minute. Let me finish so we can get the record clear, because I don't know what you are talking about, belief as distinguished from knowledge.

The test here is, as the Government said, whether the defendant knew. Now, to inject belief into it as distinguished from knowledge, I don't know how that aids the jury. So, when you talk about belief as distinguished from knowledge, I don't know what you are talking about except to inject something in here which is unnecessary.

I charged the jury that they would have to find

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that the defendant knew the checks were stolen. We have long since agreed that that is the only disputed issue of fact here. So that the Court charged the jury with respect to knowledge and said, after pointing to what the Government said was the circumstantial evidence, I said to the jury the following:

"Before you can find the defendant guilty, you must find beyond a reasonable doubt that the defendant knew the checks were stolen at the time she possessed these checks. If you find that defendant did not know the checks were stolen, then of course you must find defendant not guilty."

Now, in addition to that, when I got to the end of my discussion of each of these elements, five elements, I again said: "If you find the Government has failed to establish any one of these elements which I've just enumerated and discussed for you beyond a reasonable doubt, you must acquit the defendant. If, on the other hand, you find the Government has established each and every one of these elements beyond a reasonable doubt, you may find the defendant guilty."

Now, what are you talking about?

MR. ZEDROSSER: I am not so much contrasting belief against knowledge, I understand the Court's problem

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with that, but belief against reckless disregard. It is possible, it seems to me, for there to be a disregard but yet an actual belief.

As I read Jacobs, if there is belief, then disregard is out the window. And to give half of that, which is emphasizing the reckless disregard without telling the jury but that if she believed it, recklessly or any other way, then that is enough --

THE COURT: Well, now, how is that different from what I told the jury?

"You may also find the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen or were a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks."

MR. ZEDROSSER: If I were a juror, I would elicit that to mean that if she was reckless, that even if she believed Freddie, you could convict. That I believe is contrary to the Jacobs case and contrary to the law. That says it as clearly as I can say it.

THE COURT: I don't understand the distinction at this point between "believe" and "know."

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Do you have anything to say?

MR. KINGHAM: First of all, I agree with Mr. Zedrosser about the last part of the question as being stipulated as part of the verdict. Obviously it is not a situation for a special verdict of any kind.

Secondly, we would suggest to your Honor that the charge be reread as to reckless disregard, perhaps with the additional matters that your Honor mentioned, that the Government still must prove knowledge beyond a reasonable doubt. That is one of the elements.

MR. ZEDROSSER: As I understood the Court's charge, I hope the Court will inform me if I am wrong, what the charge does is say you may either find that the person knew or you may find that she had reckless disregard, conscious avoidance of truth, as an alternative.

So, to then go back and say "Well, but they have a burden of knowing" would still leave the jurors with the impression that they've got a choice, one of them is knowledge and one of them is something less than knowledge, in fact maybe opposed to knowledge, or that you may not know, yet you may recklessly disregard.

The other point that you very shortly made: In the Jacobs case the [illegible] said, "Guilty knowledge cannot be established by demonstrating merely negligence or even

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foolishness on the part of the defendant, and the Second Circuit cited that as one of the reasons why the conscious avoidance type language was permissible, because it was counterbalanced by language saying, "But it isn't enough just to be foolish or whatever."

Here we are getting from the defendant's point of view only the most damning part of this kind of charge without the other balancing factor.

THE COURT: All right, let's go.

(In open court, jury present.)

THE COURT: All right. Ladies and gentlemen, I have your second note, which has been marked Court Exhibit 2, which reads as follows:

"Request clarification of term 'reckless disregard' as pertains to whether defendant had knowledge of whether checks were stolen."

Now, in reply to that, I will reread that portion of the charge in which that term was used, and if that does not suffice you can let me know by written note.

You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen or were a conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts

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which would establish the stolen character of the checks.

Now, with respect to the second part of your note, which reads as follows, "Also, can that be stipulated as part of the verdict?", the answer to that is no. Your verdict must be either guilty or not guilty.

All right. You may return to the jury room.

(At 2.45 p.m., the jury again retired to continue their deliberations.)

(Court Exhibit 2 marked.)

xxx (At 4.27 p.m., in open court, jury present)

THE COURT: Ladies and gentlemen, I have your third note, which reads as follows:

"Do we have to find the guilty or innocent on each count separately or as a total?"

The answer to that is you have to return a verdict of either guilty or not guilty as to each count separately.

All right. You may return.

JUROR NO. 12: May I ask a question, please?

THE COURT: Suppose you write it out. That probably would be better. If you write it out, that would be okay. Suppose you do it in the jury room and then send it out and I'll read it. All of the jurors may go in.

(At 4.29 p.m., the jury again retired to

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continue their deliberations.)

(At 4.35 p.m., the jury returned to the courtroom.)

THE CLERK: Members of the jury, please answer present as your name is called.

(Roll called - all present.)

THE CLERK: Mr. Foreman, have you agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: How do you find the defendant Catherine Bright as charged in count one?

THE FOREMAN: Count one, not guilty.

THE CLERK: Count two?

THE FOREMAN: Not guilty.

THE CLERK: Count three?

THE FOREMAN: Not guilty.

THE CLERK: Count four?

THE FOREMAN: Not guilty.

THE CLERK: Count five?

THE FOREMAN: Guilty.

THE CLERK: Count six?

THE FOREMAN: Guilty.

THE CLERK: Count seven?

THE FOREMAN: Not guilty.